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ESSAY

NEO-BRANDEIS GOES TO WASHINGTON: A PROVISIONAL ASSESSMENT OF THE BIDEN ADMINISTRATION'S ANTITRUST RECORD

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INTRODUCTION

In early 2021, a new coterie of trustbusters came to Washington with the stated purpose of radically overhauling the antitrust status quo. The three central figures—Federal Trade Commission ("FTC") Chair Lina Khan, Department of Justice ("DOJ") Antitrust Division Assistant Attorney General ("AAG") Jonathan Kanter, and Special Assistant to the President for Technology and Competition Policy in the White House Tim Wu—were self-identified neo-Brandeisians, committed to returning antitrust policy to a contemporary version of Justice Louis Brandeis's ideas.[1] At the urging of Senator Elizabeth Warren, President Biden turned

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[1] See generally Lina Khan, The New Brandeis Movement: America's Antimonopoly Debate, 9 J. Eur. Competition L. & Prac. 131 (2018) (describing the history and merits of the "New Brandeis School's" philosophy and approach to antitrust policy); Zephyr Teachout, "The Long Future of the Neo-Brandeisian Movement, in Three Parts," Network L. Rev. (July 24, 2024), https://www.networklawreview.org/teachout-future-neobrandeis/ [https://perma.cc/KWN3-J62J] (identifying Khan, Kanter, and Wu as key neo-Brandeisian figures).

over his Administration's antitrust policy to the neo-Brandeisians,[2] who vowed to break antitrust's reigning consumer welfare standard, retool competition policy to protect other interests such as labor and small business, and significantly expand scrutiny of corporate power, particularly as to Big Tech.[3]

Four years later, as the neo-Brandeisians retreat from Washington in the wake of a new administration, it is fitting to take stock of what actually happened in those four years. Given the soaring political salience of antitrust during the Biden Administration, there is already a rush to define the narrative regarding the neo-Brandeisians' time in the nation's capital.[4] Inquiring people want to know, and manipulative people want to manipulate.

This Essay attempts to answer the "what really happened?" question with two points. First, from an immediate perspective, the revolution did not happen. On a statistical level, the neo-Brandeisians did not increase antitrust enforcement, and in many ways were *less* rigorous in bringing antitrust cases than previous administrations. (The reader should wait for more full explorations below before overreacting to this claim.) On a qualitative level, the neo-Brandeisians did attempt dramatic reform in many ways—jettisoning existing policies, implementing new, interventionist ones, advancing novel or "edgy" theories in merger and non-merger cases, and, especially, testing the FTC's rulemaking authority through an aggressive rule prohibiting employment non-compete agreements.[5] But the neo-Brandeisians leave Washington with relatively little to show for these efforts. With some important exceptions, they were not successful in advancing their "edgy" theories, they did not bring and litigate to conclusion a single civil non-merger case, and the non-compete rule has been nationally enjoined and faces grim future prospects.[6]

[2] Fred Lucas, Antitrust and Economic Leaders Have Links to Elizabeth Warren, D.C.J. (Dec. 6, 2023), https://www.dcjournal.com/antitrust-and-economic-leaders-have-links-to-elizabeth-warren/ [https://perma.cc/UW5Z-5EAE].

[3] Exec. Order No. 14,036, 3 C.F.R. 609 (2022).

[4] See, e.g., Press Release, New Economic Liberties Report Takes a Close Look at Biden and Trump Antitrust Records, Am. Econ. Liberties Project (Oct. 30, 2024), https://www.economicliberties.us/press-release/new-economic-liberties-report-takes-a-close-look-at-biden-and-trump-antitrust-records/ [https://perma.cc/B2JY-7N2K]; Will Norris, Trump vs. Biden: Who Got More Done on Antitrust?, Wash. Monthly (Apr. 7, 2024), https://washingtonmonthly.com/2024/04/07/trump-vs-biden-who-got-more-done-on-antitrust/ [https://perma.cc/3W9T-YJPE].

[5] See infra Subsection I.A.1; infra Paragraph I.A.2.ii; infra Sections I.B, I.D.

[6] See infra Paragraph I.A.2.ii; infra Sections I.B, I.D.

Countervailing the first point, this Essay's second point is that it is far too early to draw robust conclusions about the success or failure of the neo-Brandeisians' attempted revolution. For one, some of the data regarding the last year or months of the Biden Administration are not yet available,[7] and several of the significant lawsuits brought by the Administration are still pending.[8] That may take many more years. But there is an even more significant point about the need for patience: the neo-Brandeisians came to political power very early in the trajectory of their movement (perhaps too early for their own good).[9] By comparison, the last revolutionary antitrust movement—the Chicago School—spent decades building its agenda through scholarship and socialization of its ideas to law students, lawyers, and judges before it achieved success in the courts and antitrust agencies.[10] It is far too early to say what the ultimate outcome and influence of the neo-Brandeisian challenge, including the seeds sown in the last four years, will be. So, while answers to short-term questions about what the neo-Brandeisians did in Washington are largely available, any assessment must remain provisional for several decades to come.

I. THE RECORD

A. Mergers

1. Merger Policy

The neo-Brandeisians left no doubt that revitalizing merger enforcement would be one of their top priorities. At the FTC, Lina Khan lambasted the turn towards a "permissive merger policy" that began in the 1980s as courts and agencies abandoned the text of the Clayton Act and the Supreme Court's interpretation of it.[11] At the DOJ, Jonathan Kanter

[7] See Competition Enforcement Database, U.S. Fed. Trade Comm'n [hereinafter FTC Competition Enforcement Database], https://www.ftc.gov/competition-enforcement-database [https://perma.cc/3AY9-R4WQ] (last visited Aug. 30, 2025) (showing that data for fiscal year 2024 is not yet published).

[8] See, e.g., Order, United States v. Apple, Inc., No. 24-cv-04055 (D.N.J. June 30, 2025) (denying Apple's motion to dismiss); Memorandum Opinion and Order, United States v. Visa, Inc., No. 24-cv-07214 (S.D.N.Y. June 23, 2025) (denying Visa's motion to dismiss).

[9] See infra notes 203–05 and accompanying text.

[10] See infra notes 200–02 and accompanying text.

[11] Lina M. Khan, A New Perspective: Changes to FTC Merger Guidelines, M&A Law., Oct. 2022, Westlaw 26 No. 9 GLMALAW.

seconded Khan's claim that "our [merger] enforcement policy has been too permissive" and promised to right the ship.[12] President Biden's July 9, 2021 Executive Order Promoting Competition in the American Economy sided with his agency heads, opining that "as industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy and widening racial, income, and wealth inequality," and that "Federal Government inaction has contributed to these problems, with workers, farmers, small businesses, and consumers paying the price."[13] In short, the neo-Brandeisians had a mandate to revitalize merger law and turn the tide on decades of perceived neglect.

The FTC wasted no time in acting on the mandate. On September 15, 2021, the Commission voted 3-2 (with the two Republican Commissioners dissenting) to withdraw the Vertical Merger Guidelines that the Trump Administration had adopted on June 30, 2020, barely a year earlier.[14] Although there was little doubt that the Biden agencies were likely to issue new merger guidelines, the FTC's withdrawal of the Trump Guidelines was significant for two reasons. The first was that the FTC withdrew the Trump Guidelines without replacing them,[15] which suggested either a principled view that the Trump Guidelines were so deeply flawed that they could not even stay in place until new guidelines were issued, or political vindictiveness. The second was that the DOJ did not join the FTC in withdrawing the Trump Guidelines, instead keeping the existing guidelines in place until new ones were drawn up in 2023.[16]

[12] Jonathan Kanter, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Remarks at the 2023 Georgetown Antitrust Law Symposium (Sept. 19, 2023), https://www.justice.gov/archives/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-2023-georgetown-antitrust [https://perma.cc/E8ZJ-SSUT] (citing Vivek Bhattacharya, Gastón Illanes & David Stillerman, Merger Effects and Antitrust Enforcement: Evidence from US Consumer Packaged Goods (Nat'l Bureau of Econ. Rsch., Working Paper No. 31123, 2024)).

[13] Exec. Order No. 14,036, 3 C.F.R. 609 (2022).

[14] Press Release, U.S. Fed. Trade Comm'n, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary [https://perma.cc/9KF8-FHPY]; U.S. Dep't of Just. & U.S. Fed. Trade Comm'n, Vertical Merger Guidelines (2020).

[15] Joseph J. Bial et al., FTC Rescinds Vertical Guidelines, Introducing Opacity into Merger Review, Paul, Weiss, Rifkind, Wharton & Garrison LLP 1 (Sept. 15, 2021), https://www.paulweiss.com/media/mz5mjn0u/ftc_rescinds_vertical_guidelines_introducing_opacity_into_merger_review.pdf [https://perma.cc/4QNQ-4BXJ].

[16] Press Release, U.S. Dep't of Just., Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021), https://www.justice.gov/archives/opa/pr/justice-departm

But if the DOJ was reluctant to jettison the Vertical Merger Guidelines without adopting new ones, it showed little such compunction in other areas of merger policy. In 2022, the DOJ withdrew the Trump Administration's Merger Remedies Manual without replacing it.[17] In 2023, it withdrew three sets of guidelines concerning the health-care industry, including those creating safe harbors for hospital mergers and joint ventures.[18] And, in 2024, the DOJ withdrew the 1995 Bank Merger Guidelines, again without replacing them.[19] Across merger policy, the agencies' message was clear: policies from prior administrations, whether Democratic or Republican, that enabled the overly permissive merger practices of recent decades, would not stand.

If the agencies made clear their intentions on merger policy by withdrawing offending prior policies, they did so even more by promulgating new Merger Guidelines in 2023, which replaced all previous merger guidelines, whether horizontal or vertical.[20] Although the new guidelines retained some concepts from prior guidelines—particularly the Obama Administration's 2010 Horizontal Merger Guidelines—they largely represented a *tabula rasa* approach to merger guidelines.[21] This is not to say that the 2023 Guidelines were *tabula rasa*

ent-issues-statement-vertical-merger-guidelines [https://perma.cc/9422-2YQA]; Press Release, U.S. Dep't of Just., Justice Department and Federal Trade Commission Release 2023 Merger Guidelines (Dec. 18, 2023), https://www.justice.gov/archives/opa/pr/justice-department-and-federal-trade-commission-release-2023-merger-guidelines [https://perma.cc/2YAU-Q7QB].

[17] Joshua M. Goodman & Ryan Hoak, US Antitrust Agencies Take Stricter Approach to Structural Remedies Amid Growing Concern, *in* Merger Remedies Guide 71, 72 n.5 (Ronan P. Harty, Nathan Kiratzis & Anna M. Kozlowski eds., 5th ed. 2023).

[18] Lee Berger, John J. Kavanagh & Michael L. Weiner, The DOJ Withdraws Three "Outdated" Antitrust Enforcement Policy Statements Previously Providing Safe Harbors, Steptoe (Feb. 10, 2023), https://www.steptoe.com/en/news-publications/the-doj-withdraws-three-outdated-antitrust-enforcement-policy-statements-previously-providing-safe-harbors.html [https://perma.cc/ZV7P-6GK6].

[19] Press Release, U.S. Dep't of Just., Justice Department Withdraws From 1995 Bank Merger Guidelines (Sept. 17, 2024), https://www.justice.gov/archives/opa/pr/justice-department-withdraws-1995-bank-merger-guidelines [https://perma.cc/3KXS-CRG4].

[20] U.S. Dep't of Just. & U.S. Fed. Trade Comm'n, Merger Guidelines 4 (2023) [hereinafter 2023 Joint Merger Guidelines].

[21] Compare, e.g., id. at 8–10 (mergers should be scrutinized for the risk of coordination between market competitors), with U.S. Dep't of Just. & U.S. Fed. Trade Comm'n, Horizontal Merger Guidelines 24–27 (2010) [hereinafter 2010 Horizontal Merger Guidelines] (same). See also Memorandum, Steven C. Sunshine et al., DOJ and FTC Release Final 2023 Merger Guidelines Formalizing Aggressive Merger Enforcement Playbook, Skadden, Arps, Slate, Meagher & Flom LLP (Dec. 21, 2023), https://www.skadden.com/insights/publications/2023/12/doj-and-ftc-release-final-2023-merger-guidelines [https://perma.cc/VHA3-THYX]

as a general matter: the agencies made it clear that their intention was to return merger policy to its proper foundations in the text of Section Seven of the Clayton Act and in Supreme Court precedents that interpret and implement Section Seven.[22] Since the Supreme Court has not decided a merger case since 1975, the Supreme Court precedents from which the Guidelines could draft merger law were necessarily those of an earlier generation, before the Chicago School revolution had taken its toll.[23] Merger-skeptical precedents like *United States v. Philadelphia National Bank*[24] and *Brown Shoe, Co. v. United States*,[25] long assumed moribund by the antitrust establishment, would once again set the foundations of merger policy.

The core of the 2023 Guidelines are eleven "Guidelines," which are enforcement principles drawn from legal precedent, complete with footnote citations to controlling cases.[26] This hornbook focus on articulating legal principles marked a significant departure from past guidelines, which tended to emphasize technical economic principles that the agencies would employ to determine whether a merger would be likely to harm competition.[27] Technical economics still appears in the 2023 Guidelines, but it is shunted to the later parts of the Guidelines and Appendices.[28] This promotion of formal legal analysis and demotion of formal economic analysis in merger review is consistent with the neo-Brandeisians' assertion that much of antitrust's failure in recent decades arises from "put[ting] economists in charge."[29]

Lina Khan has complained that a "change in personnel followed [antitrust's] ideological overhaul, as economists began to play a much larger role at the antitrust agencies, at the expense of lawyers," and that

(noting that the 2023 Merger Guidelines mark a departure from the "past [forty] years of federal antitrust enforcement").

[22] 2023 Joint Merger Guidelines, supra note 20, at 1–2, 1 nn.2 & 5.

[23] The Supreme Court's last substantive merger decision was *United States v. Citizens & Southern National Bank*, 422 U.S. 86 (1975).

[24] 374 U.S. 321, 362–64 (1963).

[25] 370 U.S. 294, 315–16, 346 (1962).

[26] See 2023 Joint Merger Guidelines, supra note 20, at 2–3.

[27] See, e.g., 2010 Horizontal Merger Guidelines, supra note 21, at 2–4 (listing quantitative evidence that can be used to identify adverse effects).

[28] 2023 Joint Merger Guidelines, supra note 20, at 34–39.

[29] Leah Nylen, Lina Khan's Big Tech Crackdown Is Drawing Blowback. It May Succeed Anyway, Politico (Sept. 29, 2021, 7:18 PM), https://www.politico.com/news/2021/09/29/lina-khan-war-monopolies-514581 [https://perma.cc/59AH-QXK8]. (quoting Matt Stoller, Director of Research at the American Economic Liberties Project).

"[t]his shift in agency composition reflected and reinforced the shift in ideology, from broad political economy to narrow microeconomics."[30] It is clear that chief economists at the DOJ and FTC still played a significant role in the drafting of the 2023 Guidelines and that technical economics continues to appear throughout. Regardless, it is hard to deny that the Guidelines emphasize black-letter legal principles considerably more than recent versions of the guidelines.

What were the most salient legal principles advanced by the agencies to shift merger enforcement from its overly "permissive" stance?[31] Among many others, they include: resurrecting the *Philadelphia National Bank* presumption that a horizontal merger resulting in a 30% or more combined-firm share is anticompetitive (Guideline 1),[32] lowering the threshold of a "highly concentrated market" from the 2,500 sum of squares of market share recognized in the Obama Administration's Guidelines to 1,800 for purposes of the Herfindahl-Hirschman Index ("HHI") (Guideline 1),[33] presuming that vertical mergers by firms with a 50% or higher market share in related markets are anticompetitive (Guideline 5),[34] and warning that "[t]he Supreme Court has held that 'possible economies [from a merger] cannot be used as a defense to illegality.'"[35] Of particular note was Guideline 10, which for the first time identified protecting employees in labor markets from the exercise of monopsony power as a critical aim of merger law and stated that "labor

[30] Lina Khan & Sandeep Vaheesan, Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents, 11 Harv. L. & Pol'y Rev. 235, 270 (2017) (citing William Davies, Economics and the 'Nonsense' of Law: The Case of the Chicago Antitrust Revolution, 39 Econ. & Soc'y 64, 77, 79 (2010)). In 2024, Jonathan Kanter gave a high-profile speech attributing laxity in antitrust enforcement to economists' conflicts of interest. Jonathan Kanter, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Remarks for the Fordham Competition Law Institute's 51st Annual Conference on International Antitrust Law and Policy (Sept. 12, 2024), https://www.justice.gov/archives/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-fordham-competition-law-0 [https://perma.cc/9NA2-XCXJ].

[31] See supra notes 11–13 and accompanying text.

[32] 2023 Joint Merger Guidelines, supra note 20, at 5–6, 6 n.16 (quoting United States v. Phila. Nat'l Bank, 374 U.S. 321, 364 (1963)).

[33] Compare id. at 5–6, 6 n.15 (stating that "[m]arkets with an HHI greater than 1,800 are highly concentrated"), with 2010 Horizontal Merger Guidelines, supra note 21, at 19 (stating that highly concentrated markets have an HHI greater than 2,500).

[34] 2023 Joint Merger Guidelines, supra note 20, at 16 n.30.

[35] Id. at 32 (second alteration in original) (quoting FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967)).

markets can be relatively narrow," implying aggressive merger enforcement to protect labor interests.[36]

2. Merger Enforcement

i. Merger Statistics

The neo-Brandeisians made known their intentions to enforce merger law far more aggressively, but how did they actually do? There has been a good deal of commentary on social media and in the press about how aggressive the Biden agencies were in challenging mergers, particularly in comparison to other administrations.[37] There are many ways that one could measure the aggressiveness of merger scrutiny, but the obvious place to start is with the data that the agencies themselves report to Congress every year in a standardized format, which allows for comparison across time. In their Annual Report to Congress pursuant to the Hart-Scott-Rodino Act, the agencies list the total number of merger challenges that each agency brought in that fiscal year broken down into three subcategories: cases that were settled by a consent decree without litigation, cases where the parties either abandoned or restructured the deal, and cases where the agencies brought a challenge—either administratively or in federal district court in the FTC's case, or in federal court alone in the DOJ's case.[38] These categories are somewhat porous. For example, sometimes an agency files a lawsuit, and the parties then abandon the transaction or enter into a consent decree before there is any meaningful litigation, but the case is still reported as one where a lawsuit was filed. Nonetheless, the reported data is as good a snapshot of agency enforcement activity as is available.

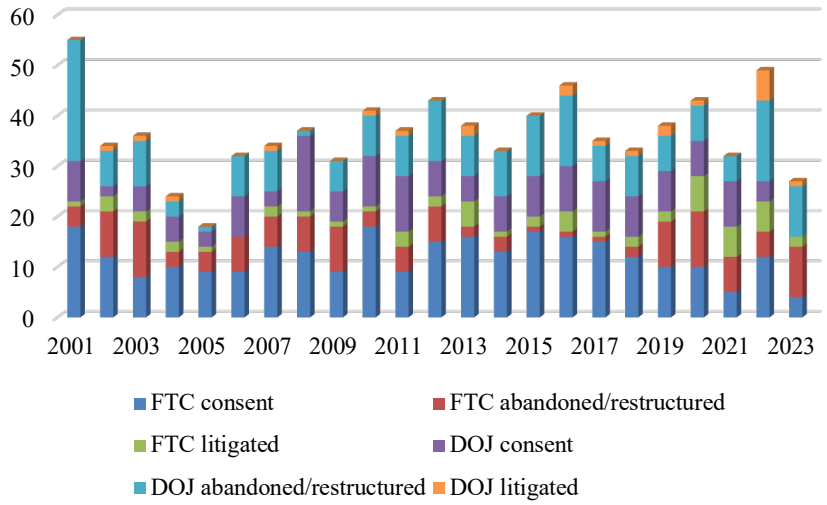
[36] Id. at 26–27. The 2010 Horizontal Merger Guidelines contained a provision on monopsonization, but it did not expressly call out labor market concerns. 2010 Horizontal Merger Guidelines, supra note 21, at 32–33.

[37] See, e.g., Eric Revell, Mergers that Were Blocked or Challenged by the Biden Admin in 2024, Fox Bus. (Dec. 26, 2024, 2:00 PM), https://www.foxbusiness.com/economy/mergers-were-blocked-challenged-biden-admin-2024 [https://perma.cc/5MFM-AP4K] ("The Biden-Harris administration took an aggressive stance in scrutinizing proposed mergers and acquisitions in recent years . . . ."); Danielle Kaye & Lauren Hirsch, American Competitor Signals Possible New Bid for U.S. Steel, N.Y. Times (Jan. 13, 2025), https://www.nytimes.com/2025/01/13/business/economy/us-steel-cleveland-cliffs-nippon.html (reporting that "regulators in the Trump administration are widely expected to take a less aggressive approach to merger enforcement than their Biden administration predecessors").

[38] See, e.g., U.S. Fed. Trade Comm'n & U.S. Dep't of Just., Hart-Scott-Rodino Annual Report: Fiscal Year 2023, at 3–5, 11–13 (2023) [hereinafter HSR Report 2023].

Figure 1 below shows FTC and DOJ challenges in three categories for each agency by year from the beginning of the George W. Bush Administration through fiscal year 2023.[39] An obvious point jumps out from the data: in at least its first three years, the Biden Administration was *not* more aggressive than the Trump, Obama, and Bush agencies in bringing merger challenges, at least on a numerical basis.[40] In fiscal years 2021 and 2023, it was actually quite modest by recent enforcement standards. While 2022 was an active year, it was hardly a record. The neo-Brandeisians' forty-nine merger challenges fell short of the fifty-five challenges brought by the 2001 Bush Administration.[41]

Figure 1. FTC & DOJ Deal Challenges (2001–2023)[42]



[39] At the time of publication, the Hart-Scott-Rodino Annual Report for fiscal year 2024 was not published.

[40] See infra Figure 1.

[41] See infra Figure 1 (showing forty-nine merger challenges in 2022 as compared to fifty-five merger challenges in 2001).

[42] The data illustrated in Figure 1 and discussed in the ensuing paragraphs are compiled from the U.S. Fed. Trade Comm'n & U.S. Dep't of Just., Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, https://www.ftc.gov/policy/reports/annual-competition-reports [https://perma.cc/QRF6-2H9Q] (last visited May 14, 2025) (compiling data from the Hart-Scott-Rodino Annual Reports from fiscal years 2001–2023).

Within the different categories of challenges, some differences from prior administrations do emerge. The Biden agencies were on average less likely to resolve cases by consent decree than other administrations, and hence more likely to see the parties restructure or abandon the deal, or to litigate.[43] During an almost two-year period following Jonathan Kanter's confirmation as AAG in charge of the Antitrust Division, the Justice Department did not enter into any merger consent decrees in accordance with Kanter's view that the agency should learn to litigate rather than settle.[44]

Figure 1 does not show one important statistic—how many cases ended up going to trial—but we can supply the data from Lexis's DOJ/FTC Antitrust Case Tracker (Merger), which tracks all litigated FTC and DOJ merger cases.[45] The Lexis tracker, which has data beginning from January 1, 2015, also allows a view of two years of the Obama Administration, four years of the first Trump Administration, and four years of the Biden Administration.[46]

During the six-year period preceding the Biden Administration, the federal agencies litigated seventeen cases to a judicial or administrative decision.[47] That averages to 2.83 tried cases per year. The agencies'

[43] See id.

[44] See Daniel A. Crane, The Radical Challenge to the Antitrust Order, 59 Wake Forest L. Rev. 399, 428–29 (2024).

[45] DOJ/FTC Antitrust Case Tracker (Merger) Archived, LexisNexis [hereinafter Archived Merger Tracker], https://advance.lexis.com/api/permalink/c0a2fc43-d446-4bce-9dc5-d872603d7fc7/?context=1000522 (last updated Apr. 8, 2025). There are different ways to report the merger enforcement data, which can lead to apparent inconsistencies. For example, Ryan Quillian and Sarah Rutherford report that "the federal antitrust agencies filed 29 litigated merger challenges, which is just two more than the 27 they filed during the first Trump administration." Ryan Quillian & Sarah Rutherford, Biden-Era M&A Data Shows Continuity, Not Revolution, Law360 (Feb. 21, 2025, 5:15 PM), https://www.law360.com/articles/2300809/biden-era-m-a-data-shows-continuity-not-revolution. I focus here on cases that were litigated to a judicial or administrative decision, a smaller number of cases than those in which a complaint was filed. However, my overall assessment of the data is consistent with Quillian and Rutherford's conclusion that "[w]hile the absolute number of merger litigations did not increase substantially, the federal antitrust agencies lost litigated merger challenges at a higher rate during the last four years than they did under prior administrations." Id.

[46] Archived Merger Tracker, supra note 45.

[47] Id. In sixteen cases, a federal district court granted or denied the government's request for a preliminary injunction, and occasionally appellate review followed. Id. The final case was litigated administratively. Id. In *United States v. AB Electrolux*, the merging parties abandoned the deal during the trial. Press Release, U.S. Dep't of Just., Electrolux and General Electric Abandon Anticompetitive Appliance Transaction After Four-Week Trial (Dec. 7, 2015), https://www.justice.gov/archives/opa/pr/electrolux-and-general-electric-abandon-anticompetitive-

overall record in those cases was twelve wins and five losses—a 70.59% win rate—with the FTC losing three cases and the DOJ losing two.[48]

The Biden Administration brought and pursued to trial thirteen merger cases[49] and filed two more merger challenges in which trial did not occur before the end of the Administration.[50] The Biden FTC also continued litigation to conclusion in two cases that were brought by the Trump FTC.[51] In sum, the neo-Brandeisians tried fifteen merger cases over four years, or 3.75 cases per year on average.

In the fifteen cases the Biden Administration tried, it achieved a record of eight wins and six losses.[52] In the final case, *Altria Group, Inc.*, the FTC initially lost before the Administrative Law Judge, but Altria subsequently withdrew from the investment, resulting in the FTC

appliance-transaction-after-four-week [https://perma.cc/5UYD-LHW5]. Since there was no judicial or administrative resolution, that case is not counted in these statistics.

[48] Archived Merger Tracker, supra note 45.

[49] Id; DOJ/FTC Antitrust Case Tracker (Merger), LexisNexis [hereinafter Merger Tracker], https://advance.lexis.com/api/permalink/9da48420-7e13-446d-8d44-b2246845235b/?context=1000522 (last updated May 14, 2025).

[50] Order Denying Defendants' Letter Requesting Expedited Case Management Conference, United States v. Glob. Bus. Travel Grp., Inc., No. 25-cv-00215 (S.D.N.Y. Jan. 24, 2025) (showing that the Complaint was filed on January 10, 2025 at the end of the Biden Administration and that trial is set for September 8, 2025); Memorandum and Order, United States v. UnitedHealth Grp. Inc., No. 24-cv-03267 (D. Md. Jan. 14, 2024) (showing that litigation was ongoing prior to, and continued through, President Trump taking office).

[51] Altria Grp., Inc., 173 F.T.C. 224, 240–41 (2022); FTC v. Hackensack Meridian Health, Inc., 30 F.4th 160, 165, 179 (3rd Cir. 2022).

[52] These data include one case, *Federal Trade Commission v. Tempur Sealy International, Inc.*, that the FTC brought and tried during the Biden Administration, but the decision denying the preliminary injunction came down two weeks into the Trump Administration. 768 F. Supp 3d 787, 862 (S.D. Tex. 2025) (FTC lost). The other challenges are: FTC v. Tapestry, Inc., 755 F. Supp. 3d 386, 498 (S.D.N.Y. 2024) (FTC won); FTC v. Kroger Co., No. 24-cv-00347, 2024 WL 5053016, at *39 (D. Or. Dec. 10, 2024) (FTC won); FTC v. Novant Health, Inc., No. 24-1526, 2024 WL 3042896, at *1 (4th Cir. June 18, 2024), *vacated as moot*, 2024 WL 3561941 (4th Cir. July 24, 2024) (FTC won); FTC v. Iqvia Holdings Inc., 710 F. Supp. 3d 329, 401 (S.D.N.Y. 2024) (FTC won); United States v. JetBlue Airways Corp., 712 F. Supp. 3d 109, 164 (D. Mass. 2024), *appeal dismissed per stipulation*, No. 24-1092, 2024 WL 3491184 (1st Cir. Mar. 5, 2024) (DOJ won); FTC v. Microsoft Corp., 681 F. Supp. 3d 1069, 1101 (N.D. Cal. 2023), *aff'd*, 136 F.4th 954, 974–75 (9th Cir. 2025) (FTC lost); FTC v. Meta Platforms Inc., 654 F. Supp. 3d 892, 941 (N.D. Cal. 2023) [hereinafter *Meta VR Fitness Case*] (FTC lost); United States v. Booz Allen Hamilton Inc., No. 22-cv-01603, 2022 WL 16553230, at *3 (D. Md. Oct. 31, 2022) (DOJ lost); United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 155 (D.D.C. 2022), *appeal dismissed per stipulation*, No. 22-5301, 2023 WL 2717667 (D.C. Cir. Mar. 27, 2023) (DOJ lost); United States v. U.S. Sugar Corp., 73 F.4th 197, 208 (3rd Cir. 2023) (DOJ lost); United States v. Bertelsmann SE & Co. KGAA, 646 F. Supp. 3d 1, 56 (D.D.C. 2022) (DOJ won); Illumina, Inc. v. FTC, 88 F.4th 1036, 1061–62 (5th Cir. 2023) (FTC won); *Hackensack Meridian Health*, 30 F.4th at 179 (FTC won).

vacating the ALJ's decision and dismissing the complaint.[53] Excluding *Altria*, that comes to a 57%-win rate. Broken down by agency (and excluding *Altria*), the FTC had six wins and three losses, whereas the DOJ had two wins and three losses.[54] Of the fifteen litigated cases, nine involved horizontal mergers, three involved vertical mergers, and two involved both vertical and horizontal mergers.[55] In the purely vertical cases, the agencies improved on the Trump Administration's record of losing its only litigated vertical merger case (and the first litigated vertical merger case since the 1970s),[56] with the FTC losing *Federal Trade Commission v. Microsoft Corp.* but winning *Illumina, Inc. v. Federal Trade Commission*.[57] (More on this below.)

How do the raw numbers reflect on the perception of an "aggressive" Biden Administration? The neo-Brandeisians were somewhat more willing to litigate to adjudicatory resolution than their predecessors (3.75 cases per year compared to 2.83 cases per year during the previous six years) and lost somewhat more (57% win rate compared to 71% win rate).[58]

Two wild cards in all of this—sleeper issues not only for evaluating merger enforcement but antitrust enforcement more generally —are the annually changing number of merger transactions that need to be scrutinized and the growth of the economy more generally. One of the most interesting statistics (which no one seems to notice) in the Hart-Scott-Rodino Annual Reports is the percentage of transactions reported under the Hart-Scott-Rodino Act in which a second request for

[53] Order to Return Case to Adjudication, Vacate Initial Decision, and Dismiss Complaint at 1, Altria Grp., Inc., No. 9393 (F.T.C. June 30, 2023).

[54] See supra note 52 (cataloging wins and losses by agency).

[55] Archived Merger Tracker, supra note 45; Merger Tracker, supra note 49.

[56] See generally Andrea Agathoklis Murino, Peter M. McCormack, Katie Drummonds & Emily Hsu, Populist Instincts: A Trump Administration Antitrust Merger Retrospective, 35 Antitrust 110 (2021) (summarizing the Trump Administration's vertical merger enforcement record and noting the AT&T / Time Warner litigation). Prior to the Trump Administration's AT&T / Time Warner challenge, the last unsuccessful vertical challenge was *Fruehauf Corp. v. Federal Trade Commission*, 603 F.2d 345 (2d Cir. 1979). Sandeep Vaheesan, Privileging Consolidation and Proscribing Cooperation: The Perversity of Contemporary Antitrust Law, 1 J.L. & Pol. Econ. 28, 30–31, 31 n.2 (2020).

[57] See supra note 55 and accompanying text (first citing *Microsoft*, 681 F. Supp. 3d at 1101; and then citing *Illumina*, 88 F.4th at 1061–62). The decision rejecting the FTC's arguments in the third vertical merger case, *Federal Trade Commission v. Tempur Sealy International*, was issued after the Biden Administration had left office. 768 F. Supp. 3d 787, 811, 862 (S.D. Tex. 2025).

[58] See supra notes 47–52 and accompanying text.

information was issued.[59] A second request is a mechanism under the Hart-Scott Rodino Act for agencies to delay the closing of a transaction so that they can obtain more information about it and scrutinize it more closely.[60] Virtually every challenge to a merger follows a second request, and historically, the vast majority of second-request cases end up in one of the three categories of merger challenges: consent decree, abandon/restructure, or litigation.[61] So, the ratio between merger filings and second requests is a seemingly important indicator of the overall aggressiveness of the agencies in challenging mergers.

Except that it is not. While only a small percentage of reported transactions receive a second request in any administration, the percentage varies considerably based on the number of transactions reported. Over the last twenty years, the percentage of reported transactions subject to a second request has ranged from a low of 1.5% in 2022 to a high of 4.5% in 2009, which means that the highest percentage is three times the lowest.[62] On the other hand, the *number* of second requests falls in a much tighter range—a low of 31 in 2009 to a high of 65 in 2021—with the high just doubling the low.[63] Between 2014 and 2022, the annual number of second requests grouped tightly between 45 and 65 (with 2023's 37 as an outlier).[64] But that relative homogeneity in second request numbers stands in contrast to very large variations in the number of reported transactions. For example, the agencies issued the same number of second requests (47) in 2015 when there were 1,754

[59] See, e.g., HSR Report 2023, supra note 38, app. A.

[60] Id. at 7 & n.21 (citing 15 U.S.C. § 18a(e)(1)(A)).

[61] David R. Brenneman, Harry T. Robins, Damos Anderson & Bernard W. Archbold, Key Takeaways From Latest HSR Data: A Continuation of Biden Administration Trends 2, Morgan Lewis (Oct. 2024), https://www.morganlewis.com/-/media/files/publication/morgan-lewis-title/white-paper/2024/key-takeaways-from-latest-hsr-data-a-continuation-of-biden-administration-trends.pdf [https://perma.cc/JWB8-487V].

[62] Compare U.S. Fed. Trade Comm'n & U.S. Dep't of Just., Hart-Scott-Rodino Annual Report: Fiscal Year 2018 app. A (2018) (showing the percentage of reported transactions subjected to a second request in 2009 as 4.5%), with HSR Report 2023, supra note 38, app. A (showing the percentage of reported transactions subjected to a second request in 2022 as 1.5%).

[63] Compare U.S. Fed. Trade Comm'n & U.S. Dep't of Just., Hart-Scott-Rodino Annual Report: Fiscal Year 2013 app. A (2013) [hereinafter HSR Report 2013] (showing that thirty-one second requests were issued in 2009), with HSR Report 2023, supra note 38, app. A (showing that sixty-five second requests were issued in 2021).

[64] HSR Report 2023, supra note 38, app. A.

reported transactions and in 2022 when there were 3,029 reported transactions.[65]

Over the three years thus far reported, the neo-Brandeisians issued far fewer second requests as a percentage of reported transactions than their predecessor administrations over the past twenty years.[66] Does this mean that the neo-Brandeisians, contrary to their reputation for aggressiveness on mergers, were actually lax? Not at all. There is a simple explanation for why, across all administrations, merger enforcement has been relatively insensitive to the level of merger activity: budget and agency resources are the rate-limiting factor. The agencies' funding does not vary with the number of reported transactions, so no matter how large or small the volume of mergers to be scrutinized is, the agency's capacity to scrutinize is the same.

The story as to mergers is part of a larger story about the funding of the antitrust agencies. As Ramsi Woodcock has documented, agency funding adjusted for the growth of Gross Domestic Product ("GDP") has been on a steady downward slide since the end of the Second World War.[67] The economy has grown tremendously, but agency funding has barely kept up with inflation.[68] While there may not be a one-to-one ratio between GDP and the amount of activity the antitrust agencies need to police, there is certainly some relationship between the volume of economic activity and potential anticompetitive behavior in need of scrutiny.[69] Is it plausible that only the same number of transactions needed a closer look in 2015 as in 2022, when there were almost twice as many transactions? No.

None of this is meant to suggest that the neo-Brandeisians were somehow lax in merger enforcement compared to prior administrations. Rather, the point is that the level of agency scrutiny is much more a function of budget than of political will in the agency heads. A company considering a potentially anticompetitive merger in 2022 had a better

[65] Id.

[66] Between 2.2–4.5% of reported transactions resulted in second requests for the years 2004–2020, as compared to 1.5–2.0% for the years 2021–2023. HSR Report 2013, supra note 63, app. A; HSR Report 2023, supra note 38, app. A.

[67] See Ramsi A. Woodcock, The Hidden Rules of a Modest Antitrust, 105 Minn. L. Rev. 2095, 2113 (2021) (showing that "after adjustment for GDP growth, antitrust enforcement budgets are currently lower as a share of GDP than they have been since 1908, and one seventh of what they were at their peak in 1942").

[68] Id. at 2114.

[69] Id. at 2113.

chance of getting it through than the same company in 2015 because the agencies' resources were spread more thinly in 2022.[70]

The headline here is that, while there were certainly differences in merger enforcement of the Biden Administration compared to prior administrations, the big-picture story is much more about continuity in real enforcement levels driven by the long-term secular trend of declining agency budgets compared to the growth of the economy. From the perspective of the regulated entities—merging parties—the best predictor of whether or not a deal will be closely scrutinized or challenged is not who is in leadership at the FTC or DOJ, but how many other mergers are being reported at the same time.[71] The neo-Brandeisians clearly wanted to earn the reputation of being far more aggressive on mergers than prior administrations, but the reality on the ground was that their hands were tied by the same budgetary and resource limitations that affect all administrations.[72]

ii. Merger Theories

If the neo-Brandeisians were not statistically more aggressive in merger cases than their predecessors, what about claims that the cases they did bring advanced bold new theories or helped to push merger law back to its more aggressive posture from the 1960s? The answer is that some of the agencies' cases made progress in advancing the progressive

[70] Compare FTC Appropriation and Full-Time Equivalent (FTE) History, U.S. Fed. Trade Comm'n, https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation [https://perma.cc/9YFZ-UWVS] (last visited May 12, 2025), and Appropriation Figures for the Antitrust Division, U.S. Dep't of Just., https://www.justice.gov/atr/appropriation-figures-antitrust-division [https://perma.cc/4ZR3-9JE4] (last updated Apr. 2025) (from 2015 to 2022, appropriations to the DOJ's Antitrust Division and the FTC increased approximately 25%), with U.S. Fed. Trade Comm'n & U.S. Dep't of Just., Hart-Scott-Rodino Annual Report: Fiscal Year 2022 app. A (2022) (reported merger transactions increased by approximately 75% from 2015 to 2022).

[71] See W. Robert Majure, Ari Gerstle & Joseph Podwol, Trends in Merger Investigations and Enforcement at the U.S. Antitrust Agencies: FY 2005–FY 2023, Cornerstone Rsch., https://www.cornerstone.com/insights/research/trends-in-merger-investigations-and-enforcement-at-the-u-s-antitrust-agencies-fy-2005-fy-2023/ [https://perma.cc/9FGE-S7NG] (last visited Aug. 6, 2025) (reporting that the percentages of mergers receiving further review "have exhibited a downward trend from their respective highs in FY 2009").

[72] Let me repeat again that, in pointing out that the Biden Administration issued a historically low number of second requests as a percentage of HSR filings, I am not criticizing the FTC and DOJ for laxity. The FTC and DOJ do not control their own budgets. Resources are finite, and there are simply not enough to keep up with the growth in merger activity. If anything, the "fault" is Congress's, not the agencies'.

spirit of the 2023 Merger Guidelines, but the agencies had more success when they advanced conventional theories.

The five cases in which the agencies arguably advanced the most "edgy" theories were two vertical challenges—*Federal Trade Commission v. Microsoft Corp.* and *Illumina, Inc. v. Federal Trade Commission*,[73] two cases in which the agencies advanced monopsonization (buyer power) or labor market harm theories—*United States v. Bertelsmann SE & Co. KGAA* and *Federal Trade Commission v. Kroger Co.*[74]—and *Federal Trade Commission v. Meta Platforms, Inc.* (*Meta VR Fitness Case*), which rested on an actual potential competition theory.[75] The agencies won three of those cases,[76] lost *Microsoft* and *Meta*,[77] and won *Kroger* on a conventional consumer-side theory while losing on the labor-side theory.[78] In rough terms, the agencies won two of their "edgy" theories and lost three.

Federal Trade Commission v. Microsoft Corp.: The FTC challenged Microsoft's acquisition of the maker of the popular *Call of Duty* video game on the grounds that post-merger Microsoft might foreclose rival video game console manufacturers (i.e., Sony PlayStation) from access to *Call of Duty* and thus eliminate competition in the concentrated high-end video game console market (in which only Microsoft and Sony competed).[79] The U.S District Court for the Northern District of California grudgingly gave the FTC the benefit of the doubt in defining a

[73] FTC v. Microsoft Corp., 681 F. Supp. 3d 1069, 1089, 1101 (N.D. Cal. 2023) (describing the FTC's claim that it need not show both incentive and ability to foreclose potential entrants post-merger); Illumina, Inc. v. FTC, 88 F.4th 1036, 1051–52 (5th Cir. 2023) (describing the FTC's theory of foreclosure which was based in part on entities not yet participating in the market).

[74] United States v. Bertelsmann SE & Co. KGAA, 646 F. Supp. 3d 1, 11 (D.D.C. 2022) (describing the government's case as "sound[ing] in 'monopsony' a market condition where a buyer with too much market power can lower prices or otherwise harm sellers"); FTC v. Kroger Co., No. 24-cv-00347, 2024 WL 5053016, at *30 (D. Or. Dec. 10, 2024) ("[The FTC] allege[s] that the proposed merger will substantially lessen competition for union grocery store labor.").

[75] *Meta VR Fitness Case*, 654 F. Supp. 3d 892, 925 (N.D. Cal. 2023) ("The FTC . . . argues that the [a]cquisition would substantially lessen competition because it deprives the . . . dedicated . . . market of the competition that would have arisen from Meta's independent entry.").

[76] *Illumina*, 88 F.4th at 1061–62; *Bertelsmann*, 646 F. Supp. 3d at 56; *Kroger*, 2024 WL 5053016, at *38–39.

[77] *Microsoft*, 681 F. Supp. 3d at 1101; *Meta VR Fitness Case*, 654 F. Supp. 3d at 941.

[78] *Kroger*, 2024 WL 5053016, at *14–15, *30, *36–38.

[79] *Microsoft*, 681 F. Supp. 3d at 1089.

relevant market that excluded the Nintendo Switch,[80] but it found that Microsoft would not have the incentive and ability to foreclose competitors post-merger.[81] The decision was largely based on the facts, but the court did reject the FTC's legal argument that in a vertical case, it need not show both an incentive and an ability to foreclose competitors, but only one or the other.[82] In the *Illumina* case, discussed next, the U.S. Court of Appeals for the Fifth Circuit appeared to accept the Northern District of California's articulation of the ability-and-incentive test.[83] *Microsoft* thus represented a failed effort by the Commission to move vertical merger doctrine in a direction more favorable to agency enforcement.

Illumina, Inc. v. Federal Trade Commission: Illumina, the acquiring company, "specializes in the manufacture and sale of next-generation sequencing ('NGS') platforms . . . a method of DNA sequencing that is used in a variety of medical applications."[84] It formed a subsidiary, Grail, whose "goal was to reach the 'Holy Grail' of cancer research—the creation of a multi-cancer early detection ('MCED') test that could identify the presence of multiple types of cancer from a single blood sample."[85] It spun off Grail and then sought to reacquire it, which set off the FTC's challenge.[86] Rival MCED companies worried that the merger would reduce Illumina's willingness to allow them to access its NGS platform on equal terms.[87] Illumina argued that the merger could not be shown unlawful without evidence that it would foreclose present MCED competitors of Grail and that there were not yet any such competitors.[88] The Fifth Circuit disagreed, finding that "there is substantial evidence in the record showing that other MCED-test developers are, right now, working on creating tests that will rival Grail's capabilities and that are expected to make it to the market in the near future."[89] This was an important win for the FTC in two ways. First, it was the first time either

[80] Id. at 1086–87.
[81] Id. at 1090–93.
[82] Id. at 1089–90.
[83] Illumina, Inc. v. FTC, 88 F.4th 1036, 1051 n.10 (5th Cir. 2023) (citing *Microsoft*, 681 F. Supp. 3d at 1090).
[84] Id. at 1044.
[85] Id.
[86] Id. at 1044–45.
[87] Id. at 1044.
[88] Id. at 1050–51.
[89] Id. at 1052.

the FTC or DOJ had won a litigated vertical merger challenge since 1972.[90] Second, the Fifth Circuit accepted a foreclosure theory based on the research and development activities of firms that were not yet selling in the market.[91] This holding establishes a bulwark for agency challenges to mergers (both vertical and horizontal) that may harm future innovation—a theory that the agencies have previously found challenging to establish.[92]

United States v. Bertelsmann SE & Co. KGAA: The DOJ successfully challenged the merger between two of the largest book publishing groups (Penguin Random House and Simon & Schuster, Inc.) purely on the theory that the merger would harm authors—i.e., the government did not try the case on the theory that consumers (book readers) would be harmed.[93] The harmed authors were those who pen "anticipated top-selling books . . . for which publishers pay an advance of at least $250,000."[94] Best-selling horror novel author Stephen King testified for the government at trial, thus making emblematic as victim of the merger an author who has sold hundreds of millions of books and likely would not struggle to make ends meet.[95] The case did establish that the government can win on a monopsonization theory including effects in labor markets, although that had not been in any doubt as a doctrinal matter since the Supreme Court's 9-0 ruling in favor of student athletes in *National Collegiate Athletic Ass'n v. Alston*.[96]

[90] See Larry Bumgardner, AT&T and Time Warner's Vertical Merger: The Court Battle and Political Undercurrent, 25 J.L. Bus. & Ethics 31, 40 (2019).

[91] *Illumina*, 88 F.4th at 1052.

[92] See Roger D. Blair, Christine S. Wilson, D. Daniel Sokol, Keith Klovers & Jeremy A. Sandford, Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff and Thinking Holistically About Efficiencies, 27 Geo. Mason L. Rev. 761, 809–10, 813–15 (2020).

[93] United States v. Bertelsmann SE & Co. KGAA, 646 F. Supp. 3d 1, 11 (D.D.C. 2022) ("The government's case sounds in 'monopsony,' a market condition where a buyer with too much market power can lower prices or otherwise harm sellers. Essentially, the government alleges that the merger will increase market concentration in the publishing industry, which will allow publishing companies to pay certain authors less money for the rights to publish their books."); id. at 56.

[94] Id. at 25 (citation omitted).

[95] Adam Bednar, Stephen King Testifies that Merger Between Publishing Giants Would Hurt Writers, N.Y. Times (Aug. 2, 2022), https://www.nytimes.com/2022/08/02/business/stephen-king-penguin-random-house-antitrust-testimony.html.

[96] 141 S. Ct. 2141, 2154 (2021) (noting that the NCAA "enjoys monopoly (or, as it's called on the buyer side, monopsony) control in th[e] labor market—such that it is capable of depressing wages below competitive levels and restricting the quantity of student-athlete labor").

Meta VR Fitness Case: The FTC sought to block Meta, which makes virtual reality ("VR") headsets, from acquiring a VR reality software developer that makes a VR fitness app.[97] In addition to arguing that the merger would deprive the market of a perceived potential competitor, the FTC argued that the merger would "deprive[] the VR dedicated fitness app market of the competition that would have arisen from Meta's independent entry into the market, a theory known as the 'actual potential competition' or 'actual potential entrant' doctrine."[98]

Although the court credited the legal viability of the actual potential competition doctrine, it concluded, based on the facts, "that it is not 'reasonably probable' that Meta would enter the market for VR dedicated fitness apps if it could not consummate the [a]cquisition."[99] At least one source close to the FTC argued that *Meta* was a partial win for the Commission because of the court's endorsement of the actual potential competition doctrine, even though it found it inapplicable on the facts.[100] But in applying the doctrine, the Northern District of California noted that it had already been endorsed by "multiple Circuit Courts," including the Eighth, Second, and Fourth,[101] and by "various district courts" as recently as the Obama Administration.[102] It is thus hard to see *Meta* as a significant development in merger law.

Federal Trade Commission v. Kroger Co.: On its way out the door, the Biden Administration won what may have been its most significant merger victory in terms of market impact for ordinary consumers. Kroger and Albertsons operate a total of 5,000 retail grocery stores across the

[97] *Meta VR Fitness Case*, 654 F. Supp. 3d 892, 903 (N.D. Cal 2023).

[98] Id. at 925, 938 (citing United States v. Marine Bancorporation, Inc., 418 U.S. 602, 633 (1974)).

[99] Id. at 938.

[100] See, e.g., Winston Cho, Meta Won Approval to Buy a Virtual Reality App, but FTC Laid Groundwork to Halt Big Tech's Next Deal, Hollywood Reporter (Feb. 26, 2023, 5:40 PM), https://www.hollywoodreporter.com/business/business-news/meta-within-ftc-challenge-legal-ruling-1235319297/ [https://perma.cc/2GTV-7Q4A] ("Despite the factual findings in the court's order, Lee Hepner, a lawyer for the American Economic Liberties Project, called the ruling a win for the FTC because the judge accepted key arguments at the heart of the commission's enforcement agenda.").

[101] *Meta VR Fitness Case*, 654 F. Supp. 3d at 926 (first citing Yamaha Motor Co., Ltd. v. FTC, 657 F.2d 971 (8th Cir. 1981); then citing United States v. Siemens Corp., 621 F.2d 499 (2d Cir. 1980); and then citing FTC v. Atl. Richfield Co., 549 F.2d 289 (4th Cir. 1977)).

[102] Id. at 926 (first citing United States v. Phillips Petroleum Co., 367 F. Supp. 1226 (C.D. Cal. 1973), *aff'd sub nom.* Tidewater Oil Co. v. United States 418 U.S. 906 (1974) (mem), and *aff'd*, 418 U.S. 906 (1974) (mem); and then citing FTC v. Steris Corp., 133 F. Supp. 3d 962, 966 (N.D. Ohio 2015)).

country,[103] and the FTC contended that their merger could reshape the market for national supermarket chains.[104] Grocery competition is inherently local—consumers only substitute to stores close to where they live[105]—and the FTC presented evidence that between 1,574 and 1,922 local geographic markets would be presumptively overconcentrated because of the merger.[106] On these theories, the FTC won, and the merger was enjoined.[107] That was the conventional horizontal merger part of the case. The FTC also advanced a labor market theory centered on a proposed relevant market for "union grocery labor."[108] The district court tentatively credited the FTC's proposed market, but found that "plaintiffs have not presented sufficient evidence to establish a prima facie case that the proposed merger will substantially lessen competition for union grocery labor."[109] The decision may continue the agencies' project from *Bertelsmann* of mainstreaming labor market theories in merger cases,[110] but it marks a failure to succeed on such a theory on behalf of blue-collar workers, a contrast to the DOJ's win for rich authors. Perhaps not the look the neo-Brandeisians wanted?

So, what is the best understanding of the Biden Administration's record in "edgy" merger cases? *Illumina* was a big win on vertical mergers and innovation more generally, and it may eventually come to be seen as a landmark. The other two wins have the paradoxical tendency of looking, in combination, like a loss for neo-Brandeisians' push for a labor-centric antitrust. If the best that such antitrust theories can deliver is higher advances for Stephen King, the progressive motivation to bring more cases may not be obvious. And the two merger cases seeking to rein in Big Tech behemoths—*Meta* and *Microsoft*—were simply failures.

Looking again at the agencies' overall record in merger challenges, the impression that emerges is that they did relatively well when pursuing conventional theories and established doctrines. Most administrations would consider that a marker of success. But for an administration whose prime directive was to disrupt antitrust's status quo, the overall outcomes can only be seen as a disappointment.

[103] FTC v. Kroger Co., No. 24-cv-00347, 2024 WL 5053016, at *2–3 (D. Or. Dec. 10, 2024).
[104] Id. at *6.
[105] Id. at *12.
[106] Id. at *15.
[107] Id. at *17, *39.
[108] Id. at *32 (citation omitted).
[109] Id. at *37–38 (emphasis omitted).
[110] 646 F. Supp. 3d 1, 11 (D.D.C. 2022).

B. Civil Non-Merger

Both the DOJ and FTC track and report a measure of their antitrust enforcement called "civil non-merger." As the name would suggest, this includes all antitrust enforcement outside of merger cases and criminal cases—agreements restraining competition under Section One of the Sherman Act that are not criminally prosecuted, monopolization offenses under Section Two of the Sherman Act, and Robinson-Patman Act cases concerning anticompetitive price discrimination.[111] Figure 2 below shows civil non-merger filings by both agencies from the Bush Administration through the Obama Administration.[112] Two significant caveats about the data presented: First, the FTC has not yet reported its 2024 numbers.[113] Second, two cases brought under the Trump Administration, one brought by the DOJ against Google (*United States v. Google LLC*) and one brought by the FTC against Meta (*FTC v. Facebook, Inc.*), were filed shortly after fiscal year 2020 ended, which means that there was even less civil non-merger enforcement activity in the first two years of the Biden Administration than the figure below suggests.[114]

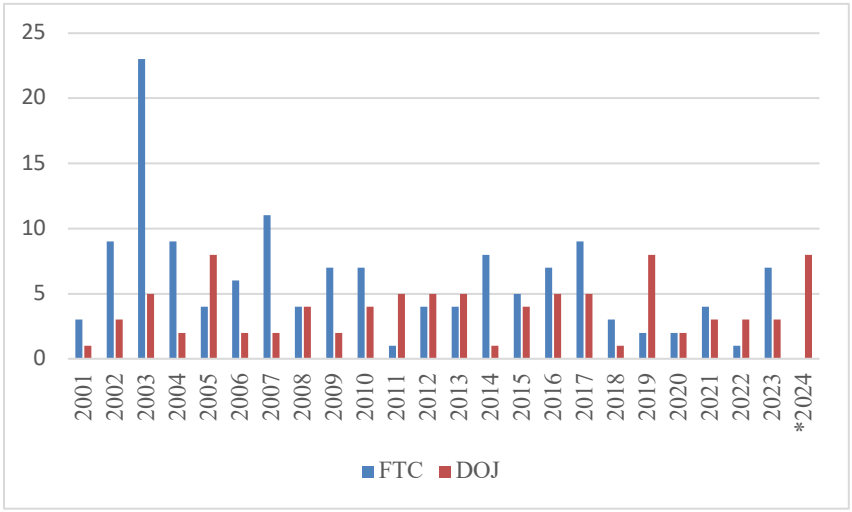
[111] Sherman Act, 15 U.S.C. §§ 1–2; Robinson-Patman Act, 15 U.S.C. § 13.

[112] These data are gathered from the Justice Department's workload statistics archives and the FTC's Competition Enforcement Database. Division Operations: Historic Workload Statistics, U.S. Dep't of Just., Antitrust Div. [hereinafter DOJ Historic Workload Statistics], https://www.justice.gov/atr/division-operations [https://perma.cc/UA9Z-XFQE] (last updated Jan. 23, 2025) (compiling data from Report for FY 2000–2009, at 4; Report for FY 2010–2019, at 4; Report for FY 2015–2024, at 2); FTC Competition Enforcement Database, supra note 7.

[113] See FTC Competition Enforcement Database, supra note 7 (showing that the FTC has not yet published 2024 data for its Competition Enforcement Database).

[114] United States v. Google LLC, 747 F. Supp. 3d 1, 33 (D.D.C. 2024) [hereinafter *Google Mobile Search Case*] (Complaint filed October 20, 2020); FTC v. Facebook, Inc., 581 F. Supp. 3d 34, 41 (D.D.C. 2022) [hereinafter *Meta Social Media Case*] (Complaint filed December 9, 2020). Note that fiscal year 2020 ended on September 30, 2020.

Figure 2. Civil Non-Merger Cases Filed[115]



The obvious headline that appears from these data is that, just as they did not increase merger enforcement at a statistical level, the neo-Brandeisians did not increase civil non-merger enforcement at a statistical level. If anything, the statistical enforcement record looks paltry.

But here, in particular, one should urge caution in inferring the level of agency rigor in enforcing the antitrust laws from the number of cases they bring. A blockbuster case to break up AT&T, IBM, Microsoft, Facebook, or Google is an entirely different proposition from a monopolization case concerning the sale of inpatient hospital services to insurance companies in a geographic area "no larger than the Wichita Falls Metropolitan Statistical Area,"[116] which was the only case in which monopolization was the primary offense brought by the Obama Justice Department.[117]

[115] DOJ Historic Workload Statistics, supra note 112 (compiling data from Report for FY 2000–2009, at 4; Report for FY 2010–2019, at 4; Report for FY 2015–2024, at 2); FTC Competition Enforcement Database, supra note 7. The FTC has not yet reported data for 2024.

[116] Complaint at 7, United States v. United Reg'l Health Care Sys., No. 11-cv-00030 (N.D. Tex. Sept. 29, 2011).

[117] DOJ Historic Workload Statistics, supra note 112 (compiling data from Report for FY 2000–2009, at 6; Report for FY 2010–2019, at 6). Cases only appear in these statistics if monopolization was the primary type of conduct alleged. See, e.g., id. (Report for FY 2010–2019, at 1 n.1) ("Statistics reflect only the primary type of conduct under investigation at the outset of the investigation; this report does not reflect whether a matter investigated a potential violation of any additional statutes, or whether the primary violation changed during the

Indeed, it was the only one brought by the Bush, Obama, or Trump Justice Departments before the Trump DOJ's monopolization case against Google.[118] The neo-Brandeisians brought few civil non-merger cases, but the ones they did bring were potentially consequential.

1. Monopolization / Big Tech

Between 2001 and 2019, the Justice Department's workload statistics show that the Department filed only one case in which monopolization was the primary theory, and as previously noted, it was not a terribly significant one.[119] Things began to change at the end of the Trump Administration. The Trump DOJ brought a monopolization case against Google concerning mobile search, which the Biden Administration took to trial and won,[120] and the Trump FTC brought the *Meta Social Media Case*, which is still pending.[121] The Biden DOJ initiated a second monopolization case against Google—this one concerning AdTech[122]—and a monopolization case against Apple.[123] Meanwhile, the FTC brought a landmark monopolization case against Amazon.[124] All of these cases likely involve a very significant allocation of agency resources, have the potential to reshape enormously consequential markets, and might establish new legal precedents. No doubt, the neo-Brandeisians had the ambition to revitalize monopolization law and acted consequentially on those ambitions.

Beyond the fact that the neo-Brandeisians did what they said they would do on monopolization and Big Tech, it is difficult at present to evaluate the success or long-term impact of these cases. Only one, the

pendency of the investigation."). Daniel Francis collects some additional cases in which a Section Two theory was asserted along with a different primary theory. See Daniel Francis, Making Sense of Monopolization, 84 Antitrust L.J. 779, 839 (2022) (collecting cases).

[118] DOJ Historic Workload Statistics, supra note 112 (compiling data from Report for FY 2000–2009, at 6; Report for FY 2010–2019, at 6).

[119] Id. (compiling data from Report for FY 2000–2009, at 6; Report for FY 2010–2019, at 6); Complaint, supra note 116, at 7.

[120] *Google Mobile Search Case*, 747 F. Supp. 3d 1, 33, 187 (D.D.C. 2024).

[121] FTC v. Facebook, Inc., 581 F. Supp. 3d 34, 41 (D.D.C. 2022) (Complaint filed December 9, 2020); Cecilia Kang, Mike Isaac & David McCabe, Mark Zuckerberg Takes Stand to Defend Meta Against Antitrust Suit, N.Y. Times (Apr. 14, 2025), https://www.nytimes.com/2025/04/14/technology/meta-antitrust-trial-ftc.html.

[122] United States v. Google LLC, 778 F. Supp. 3d 797, 810–11 (E.D. Va. 2025) [hereinafter *Google AdTech Case*].

[123] Complaint, United States v. Apple Inc., No. 24-cv-04055 (D.N.J. Mar. 21, 2024).

[124] Complaint, FTC v. Amazon.com, Inc., No. 23-cv-01495 (W.D. Wash. Nov. 2, 2023).

Google Mobile Search Case, which was brought by the prior administration, was tried to decision before the conclusion of the Biden Administration.[125] The DOJ won on the merits and requested a very aggressive set of remedies, only some of which were granted by the district court.[126] The DOJ's *Google AdTech* case was tried during the Biden Administration, and the court issued an order finding liability on April 17, 2025, with the remedy phase still to come as of this writing.[127] The FTC's *Meta Social Media Case*, also brought during the Trump Administration, was significantly carved down by the D.C. Circuit,[128] and what is left of the case concluded trial in May 2025.[129] This means that the neo-Brandeisians will not get credit for either bringing the suit or trying the case. Both the Apple and Amazon cases were filed too late in the Biden Administration for there to be significant developments yet.[130]

While it is still too early to determine the overall impact of the Biden Administration's Section Two enforcement, the following point is clear: the neo-Brandeisians aggressively pursued cases brought by the Trump

[125] *Google Mobile Search Case*, 747 F. Supp. 3d 1, 33–34 (D.D.C. 2024).

[126] Id. at 33, 187–88; see, e.g., Plaintiffs' Proposed Remedy Framework at 4–5, *Google Mobile Search Case*, 747 F. Supp. 3d 1 (D.D.C. 2024) (No. 20-cv-03010). The remedies phase closed at the end of May 2025, and the decision was issued in September 2025. Jennifer Elias, Google Would Need to Shift Up to 2,000 Employees for Antitrust Remedies, Search Head Says, CNBC (May 9, 2025, 4:08 PM), https://www.cnbc.com/2025/05/09/google-search-remedies-trial-wraps.html [https://perma.cc/VQT5-DYDW]; David McCabe, Google Avoids Harshest Penalties in Landmark Search Monopoly Ruling, N.Y. Times (Sept. 2, 2025, 7:59 PM) https://www.nytimes.com/2025/09/02/technology/google-search-antitrust-decision.html. Google has said that it will appeal the District Court's decision once the remedies phase is complete. Jaclyn Diaz, The Justice Department and Google Battle Over How to Fix a Search Engine Monopoly, NPR (Apr. 21, 2025, 5:10 PM), https://www.npr.org/2025/04/21/nx-s1-5369404/google-doj-opening-statements-remedies-trial [https://perma.cc/RV9G-QZCH].

[127] *Google AdTech Case*, 778 F. Supp. 3d 797, 872 (E.D. Va. 2025); David McCabe & Cecilia Kang, U.S. Says Google Is an Ad Tech Monopolist, in Closing Arguments, N.Y. Times (Nov. 25, 2024), https://www.nytimes.com/2024/11/25/technology/google-advertising-monopoly.html. The remedies trial is set to begin in September 2025. Elias, supra note 126.

[128] The district court dismissed both the FTC and the state attorney general complaints against Meta related to its integration and core functionality policies and also dismissed state claims in their entirety on laches grounds. New York v. Facebook, Inc., 549 F. Supp. 3d 6, 24, 34–35 (D.D.C. 2021), *aff'd sub nom.* New York v. Meta Platforms, Inc., 66 F.4th 288 (D.C. Cir. 2023) (ruling only on the District Court's dismissal of the state claims). The states appealed and lost on both laches and the substantive grounds in the D.C. Circuit, which means, in effect, the FTC lost on those grounds too even though its appeal to the D.C. Circuit was not yet ripe. *Meta Platforms*, 66 F.4th at 301–02, 304–06.

[129] Cecilia Kang, Meta's Fate Now Rests With a Judge, N.Y. Times (May 27, 2025), https://www.nytimes.com/2025/05/27/technology/meta-antitrust-trial-concludes.html.

[130] Docket, United States v. Apple Inc., No. 24-cv-04055 (D.N.J. Mar. 21, 2024); Docket, FTC v. Amazon.com, No. 23-cv-01495 (W.D. Wash. Sept. 26, 2023).

Administration and brought three new Big Tech monopolization cases of their own, but they saw none of them through to final resolution. All of the cases have now passed into the hands of the second Trump Administration, whose antitrust policies remain the subject of considerable speculation.[131] One might observe that this outcome was inevitable—monopolization cases inherently take a long time to resolve, so what turned out to be a one-term Administration could not ultimately have owned any of the Big Tech cases. But that assumes a policy of litigating to final judicial determination rather than resolving cases through consent decree, as the Obama FTC did with earlier cases against Google (for allegedly suppressing competition in digital devices and online search advertising markets)[132] and Intel (for allegedly foreclosing competitors in the computer microchip market),[133] and as the Bush DOJ did with Microsoft (for allegedly monopolizing the web browser market).[134] The neo-Brandeisians did not want to settle with Big Tech. As AAG Jonathan Kanter stated publicly on many occasions, the DOJ's policy was to litigate, not to settle.[135] In sharp contrast, Gail Slater—Trump's AAG—has promised to settle matters through consent decree when doing so could achieve favorable outcomes.[136] The neo-Brandeisians' settlement aversion may be a principled position, and it may pay dividends in the long run, but it also meant that the neo-Brandeisians gave up ultimate ownership of any of the Big Tech cases.

[131] Julia Shapero, Why Trump's Antitrust Agenda Could Spell Trouble for Big Tech, The Hill (Mar. 20, 2025, 6:00 AM), https://thehill.com/policy/technology/5203823-why-trumps-antitrust-agenda-could-spell-trouble-for-big-tech/ [https://perma.cc/44KJ-JKGV] (analyzing developments in the FTC and DOJ and what they could mean for antitrust enforcement).

[132] Press Release, U.S. Fed. Trade Comm'n, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (Jan. 3, 2013), https://www.ftc.gov/news-events/news/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc-competition-concerns-markets-devices-smart [https://perma.cc/WQ2C-ZHL8].

[133] Intel Corp., 150 F.T.C. 420, 455 (2010).

[134] United States v. Microsoft Corp., 231 F. Supp. 2d 144, 149–50 (D.D.C. 2002), *aff'd in part and rev'd in part on other grounds sub nom.* Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1250 (D.C. Cir. 2004).

[135] E.g., Jonathan Kanter, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022), https://www.justice.gov/archives/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers [https://perma.cc/KC9T-8L2Y] ("We are more committed than ever to litigating when we believe a violation has taken place.").

[136] Sen. Mazie K. Hirono Questions for the Record for Gail Slater: Nominations Hearing Before the S. Judiciary Comm., 119th Cong. 1 (2025) (response of Gail Slater, Nominee for Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just.).

2. Other Monopolization and Section One Enforcement

If prior administrations were not bringing many monopolization cases, what kinds of civil non-merger cases were they bringing? The answer is cases involving restrictive policies or agreements under Section One of the Sherman Act, such as the Obama Administration's suit against American Express over its anti-steering rules[137] or the Trump Administration's suit against the National Association of Realtors over real estate listing rules.[138] The Biden Administration brought several such cases, which sometimes included both Section One and Section Two counts. It also brought monopolization cases outside of those against Big Tech.

Under Sections One and Two of the Sherman Act, the Justice Department sued Visa for restraining competition in and monopolizing network card services,[139] Ticketmaster and LiveNation for restricting competition in the live concert ecosystem,[140] and RealPage in a potentially landmark case for alleged algorithmic collusion in setting residential rental prices.[141] For its part, the FTC took an interest in agriculture, bringing a monopolization case alleging that Syngenta Crop Protection and Corteva, Inc. used loyalty programs to block and restrict generic competition from pesticide markets, leaving farmers to pay elevated prices for crop protection.[142] It also brought a novel price exploitation case "against the three largest prescription drug benefit managers (PBMs)—Caremark Rx, Express Scripts (ESI), and OptumRx—and their affiliated group purchasing organizations" for allegedly "engaging in anticompetitive and unfair rebating practices that have artificially inflated the list price of insulin drugs, impaired patients' access to lower list price products, and shifted the cost of high insulin list

[137] Ohio v. Am. Express Co., 585 U.S. 529, 539 (2018).

[138] United States v. National Association of Realtors Proposed Final Judgment and Competitive Impact Statement, 85 Fed. Reg. 81489, 81489–90 (Dec. 16, 2020) (alleging that the rules adopted by the National Association of Realtors "result[ed] in a lessening of competition among real estate brokers to the detriment of American home buyers").

[139] Complaint at 11, United States v. Visa Inc., No. 24-cv-07214 (S.D.N.Y. Sept. 24, 2024).

[140] Complaint at 78–84, United States v. Live Nation Ent., Inc., No. 24-cv-03973 (S.D.N.Y May 23, 2024).

[141] Complaint at 81–87, United States v. RealPage, Inc., No. 24-cv-00710 (M.D.N.C. Aug. 23, 2024).

[142] FTC v. Syngenta Crop Prot. AG, 711 F. Supp. 3d 545, 561 (M.D.N.C. 2024).

prices to vulnerable patients."[143] Then, five days before the close of the Biden Administration, on January 15, 2025, the FTC brought a monopolization case against Deere & Co. for restricting farmers' ability to obtain independent repair services for farm equipment.[144]

Many or all of these civil non-merger cases could turn out to be significant. But, as with the Big Tech monopolization cases, the conclusion of the neo-Brandeisians' four years in Washington leaves large question marks over all of them. Most of the cases were brought late in the Administration, and not one was resolved or advanced beyond initial stages at the conclusion of the Biden Administration. Control over these matters and their ultimate disposition fell to the second Trump Administration, which will likely take a different view on at least some of the relevant issues (like standalone Section Five). It would be

[143] Press Release, U.S. Fed. Trade Comm'n, FTC Sues Prescription Drug Middlemen for Artificially Inflating Insulin Drug Prices (Sept. 20, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-sues-prescription-drug-middlemen-artificially-inflating-insulin-drug-prices [https://perma.cc/CC92-GKMT]. This could be significant because of the legal theory on which the Commission relies. *Caremark Rx, LLC* is a "standalone" Section Five case, meaning that the Commission claims that the defendants violated Section Five of the FTC Act's prohibition on "unfair methods of competition" without linking the alleged violation to a violation of the Sherman Act. Complaint at 4, Caremark Rx, LLC, No. 9437 (F.T.C. Sept. 20, 2024). Although the Supreme Court has ruled that Section Five covers conduct that would not violate the Sherman Act, in recent decades the FTC has tended to link Section Five enforcement to accepted Sherman Act theories, and the scope of the FTC's standalone Section Five powers has been controversial. See Daniel A. Crane, The Institutional Structure of Antitrust Enforcement 135–137 (2011). One of the Biden FTC's first actions was to withdraw an Obama FTC policy statement on Section Five enforcement. U.S. Fed. Trade Comm'n, Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf [https://perma.cc/LF2Z-RZFK]. The Biden FTC then issued a new policy statement that suggested much more aggressive Section Five enforcement. U.S. Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf [https://perma.cc/XP62-8PLN]. The *Caremark Rx, LLC* complaint is significant not only for pursuing a standalone Section Five claim, but also for appearing to suggest that behavior that amounts to an exploitation of market power to charge higher prices—but that does not necessarily increase or protect market power—could be a violation of the antitrust laws. Complaint at 2–3, *Caremark Rx, LLC*, No. 9437. See also Daniel A. Crane, Tying Law for the Digital Age, 99 Notre Dame L. Rev. 821, 869 (2024) (explaining that U.S. antitrust law "sanctions conduct that creates, preserves, or extends market power, but not conduct that merely involves its exploitation").

[144] Complaint at 1–2, FTC v. Deere & Co., No. 25-cv-50017, 2025 WL 105231 (N.D. Ill. Jan. 15, 2025).

guesswork to say that many of these matters—like the Big Tech cases—will likely be resolved through consent decree. Guesswork, but not a bad guess.[145]

3. Robinson-Patman Act

One area of civil non-merger enforcement in which the Biden FTC made a conspicuous, although late in the game, move was in bringing two actions under the Robinson-Patman Act, one against Southern Glazer's Wine and Spirits on December 12, 2024,[146] and another against PepsiCo on January 17, 2025.[147] Prior to the neo-Brandeisians' arrival in Washington, the FTC had not brought a Robinson-Patman case since 2000,[148] and the bipartisan Antitrust Modernization Commission had recommended the statute's repeal in its entirety in 2007.[149] The antitrust establishment appeared roundly against reviving the statute.[150] But the neo-Brandeisians had a very different perspective. In her 2017 *Yale Law Journal* Note on Amazon—the publication that propelled her to prominence—Lina Khan lamented the Chicago School's takedown of Robinson-Patman enforcement.[151] In a 2023 address, Khan, now as Chair of the FTC, again took issue with the antitrust establishment's abandonment of the Robinson-Patman Act, saying, "I really worry about

[145] See Josh Sisco & Leah Nylen, Antitrust Leaders Push to Shield High-Profile Cases From DOJ Cuts, Bloomberg (Apr. 2, 2025, 5:34 PM), https://www.bloomberg.com/news/articles/2025-04-02/antitrust-leaders-push-to-shield-tech-egg-probes-from-doj-cuts.

[146] Press Release, U.S. Fed. Trade Comm'n, FTC Sues Southern Glazer's for Illegal Price Discrimination (Dec. 12, 2024) [hereinafter U.S. Fed. Trade Comm'n, Southern Glazer's], https://www.ftc.gov/news-events/news/press-releases/2024/12/ftc-sues-southern-glazers-illegal-price-discrimination [https://perma.cc/ST5X-WWL4].

[147] Press Release, U.S. Fed. Trade Comm'n, FTC Sues PepsiCo for Rigging Soft Drink Competition (Jan. 17, 2025) [hereinafter U.S. Fed. Trade Comm'n, PepsiCo], https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-sues-pepsico-rigging-soft-drink-competition [https://perma.cc/ST5X-WWL4].

[148] Jay B. Sykes, Cong. Rsch. Serv., LSB11257, FTC Revives Enforcement of the Robinson-Patman Act 1 (2025), https://www.congress.gov/crs_external_products/LSB/PDF/LSB11257/LSB11257.1.pdf [https://perma.cc/66K6-7XHX] (citing McCormick & Co., 129 F.T.C. 903 (2000)).

[149] Antitrust Modernization Comm'n, Report and Recommendations 20 (2007).

[150] Dissenting Statement of Commissioner Andrew N. Ferguson: In the Matter of Southern Glazer's Wine and Spirits, LLC, U.S. Fed. Trade Comm'n 1 (Dec. 12, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-southernglazers-statement.pdf [https://perma.cc/8JQF-YWQH] ("For decades, a bipartisan, anti-enforcement consensus has prevailed among federal antitrust enforcers, the bar, and the academy. The Act's opponents have argued that the Act rests on bad economics and that enforcement would injure consumers . . . .").

[151] Lina M. Khan, Note, Amazon's Antitrust Paradox, 126 Yale L.J. 710, 724–27 (2017).

instances in which enforcers just decide that they don't agree with the values or the policies underlying laws that Congress has passed, so they walk away from enforcement entirely."[152] Recognizing that revitalizing Robinson-Patman enforcement would require rebuilding enforcement capacity, Khan said, "We're having to build up institutional muscle to determine how we might be able to move forward in this area."[153]

The need to build "institutional muscle" before bringing a Robinson-Patman case might explain why the Commission waited until the eleventh-and-a-half hour to bring the cases, but it again points to the potential frailty of the neo-Brandeisians' antitrust revitalization project. In both cases, the two Republican commissioners—including Andrew Ferguson, who is now the Chair of the Commission—dissented from bringing the case.[154] Although President Trump's pick for the third Republican seat—Mark Meador— has publicly supported the Robinson-Patman revival,[155] the FTC announced that it was dismissing the suit against PepsiCo on May 22, 2025.[156] Perhaps *Southern Glazer*, if not dismissed, will proceed and become a landmark of neo-Brandeisian success. But, as with the other civil non-merger cases, its fate is now entirely outside the neo-Brandeisians' control.

C. Criminal Enforcement

The Justice Department has the power to enforce the Sherman Act criminally, while the FTC does not.[157] The progressive-leaning American Antitrust Institute gave the first Trump Administration low marks for its

[152] Q&A with Lina Khan, Chair of the U.S. Federal Trade Commission and Mark Glick, Professor of Economics at the University of Utah (Nov. 1, 2022), *in* 2023 Utah L. Rev. 757, 760.

[153] Id.

[154] U.S. Fed. Trade Comm'n, Southern Glazer's, supra note 146 (noting the dissents of Commissioners Holyoak and Ferguson); U.S. Fed. Trade Comm'n, PepsiCo, supra note 147 (same).

[155] Mark Ross Meador, Not Enforcing the Robinson-Patman Act Is Lawless and Likely Harms Consumers, Federalist Soc'y (July 9, 2024), https://fedsoc.org/commentary/fedsoc-blog/not-enforcing-the-robinson-patman-act-is-lawless-and-likely-harms-consumers [https://perma.cc/7JMT-C4CR].

[156] Press Release, U.S. Fed. Trade Comm'n, FTC Dismisses Lawsuit Against PepsiCo (May 22, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/05/ftc-dismisses-lawsuit-against-pepsico [https://perma.cc/YE97-P2BQ].

[157] U.S. Fed. Trade Comm'n, A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority app. A, https://www.ftc.gov/about-ftc/mission/enforcement-authority [https://perma.cc/8HCB-DLSV] (last updated July 2025).

antitrust enforcement generally and its criminal enforcement in particular, pointing out the low number of criminal cases brought, convictions, incarcerations, and fines collected.[158] So how did the neo-Brandeisians fare with criminal enforcement? The following three charts, lifted directly from the Justice Department's annual reporting on Criminal Enforcement Trends, tell the story.[159]

[158] Am. Antitrust Inst., The State of Antitrust Enforcement and Competition Policy in the U.S. 12–13 (2020), https://www.antitrustinstitute.org/wp-content/uploads/2020/04/AAI_StateofAntitrust2019_FINAL3.pdf [https://perma.cc/86BV-T27R].

[159] Criminal Enforcement Trends Charts, U.S. Dep't of Justice, https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts [https://perma.cc/Y5LE-GV5R] (last updated May 2, 2025).

Figure 3. Criminal Enforcement Trends Charts Through Fiscal Year 2024: Corporations & Individuals Charged[160]

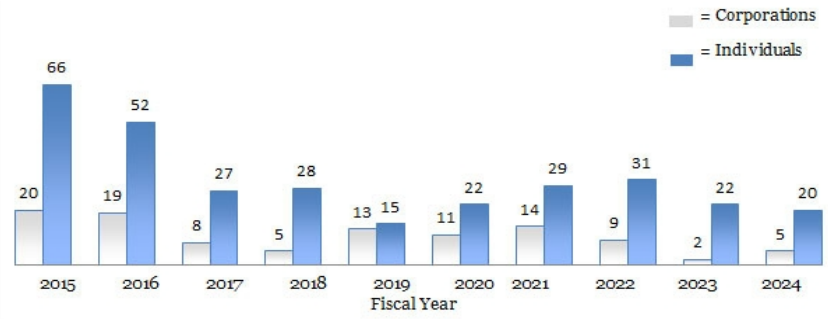
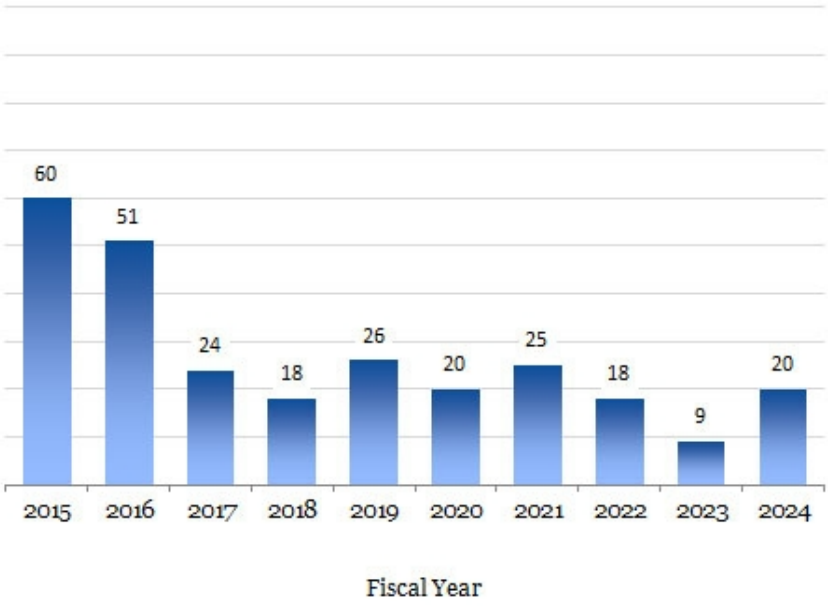
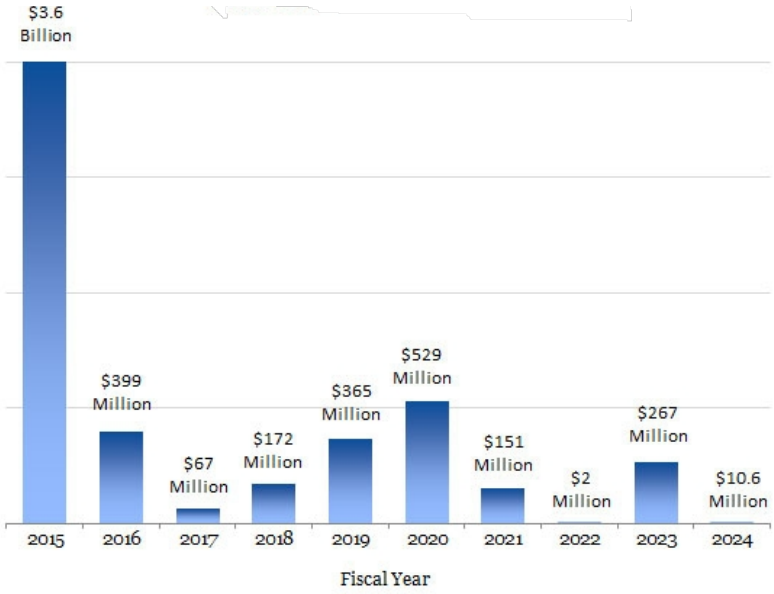


Figure 4. Criminal Enforcement Trends Charts Through Fiscal Year 2024: Total Criminal Cases Filed[161]



[160] Id.
[161] Id.

Figure 5. Criminal Enforcement Trends Charts Through Fiscal Year 2024: Total Fines & Penalties[162]



Compared to the Trump Administration, the Biden Administration charged more defendants, but it brought fewer cases and collected far fewer fines. Putting aside the possibility that the report for fiscal year 2025—which will include the last few months of the Biden Administration—shows some remarkable acceleration of criminal enforcement, the statistical story of criminal antitrust in the Biden Administration will be one of low levels of criminal enforcement as compared to the Trump Administration, and especially as compared to the Obama and Bush Administrations.[163]

On a qualitative level, two particular subjects of criminal enforcement—Section Two of the Sherman Act and "no poach" agreements affecting employees—made headlines. Early in the Biden

[162] Id.

[163] DOJ Historic Workload Statistics, supra note 112 (compiling data from Report for FY 2000–2009, at 8–9; Report for FY 2010–2019, at 7–8; Report for FY 2015–2024, at 3–4) (demonstrating that the Bush DOJ filed 320 criminal cases (or 160 on average per four-year term), the Obama DOJ filed 495 criminal cases (or 247.5 on average per four-year term), the first Trump DOJ filed 88 criminal cases, and the Biden DOJ filed 72).

Administration, the senior leadership of the Antitrust Division made waves by publicly announcing that the Administration would enforce Section Two of the Sherman Act criminally and by updating the Antitrust Division Manual to reflect that change in enforcement policy.[164] The Justice Department had not criminally enforced Section Two since 1977,[165] and this announcement caused a fair degree of consternation in the business community. The defense bar called the announcement "a 'surprising' and 'significant policy shift' with 'far-reaching' implications."[166] Would the Justice Department be bringing its criminal enforcement powers to bear on Big Tech or other big companies as it had routinely done in the 1950s and 60s?[167] ?

The Biden Administration lived up to its promise of bringing criminal Section Two cases by bringing three criminal indictments,[168] although maybe not in a way that caused any consternation in Silicon Valley or on Wall Street. In one case, the defendant pled guilty to conspiring to monopolize the market for fuel truck services used to assist the U.S. Forest Service.[169] In the second case, the DOJ secured an attempted monopolization guilty plea for an individual who unsuccessfully tried to recruit a competitor into allocating highway crack-sealing services markets in Montana and Wyoming.[170] And in the third case, the DOJ charged that defendants violated both Sections One and Two by price

[164] See Daniel A. Crane, Criminal Enforcement of Section 2 of the Sherman Act: An Empirical Assessment, 84 Antitrust L.J. 753, 753–54 (2022).

[165] Id. at 755.

[166] Id. at 753–54 (footnotes omitted) (first quoting Antitrust Division Announces Newfound Intent to Pursue Monopolization Cases Criminally, BakerHostetler (Mar. 4, 2022), https://www.bakerlaw.com/insights/antitrust-division-announces-newfound-intent-to-pursue-monopolization-cases-criminally/ [https://perma.cc/HE2A-RVBV]; then quoting Kathryn Hellings & Daniel Shulak, Head of DOJ Criminal Antitrust Unit Says that Criminal Monopolization Cases May Be on the Horizon, Hogan Lovells (Mar. 3, 2022), https://www.hoganlovells.com/en/publications/head-of-doj-criminal-antitrust-unit-says-that-criminal-monopolization-cases-may-be-on-the-horizon [https://perma.cc/FQW2-WVL6]; and then quoting Nicholas J. Giles et al., DOJ Signals Intent to Bring Criminal Charges for Monopolization, McGuireWoods (Mar. 7, 2022), https://www.mcguirewoods.com/client-resources/alerts/2022/3/doj-signals-intent-to-bring-criminal-charges-for-monopolization/ [https://perma.cc/J3Q4-MWHL]).

[167] Crane, supra note 164, at 766 (cataloguing nine Section Two criminal cases brought in the 1950s–60s).

[168] United States: DOJ Scores Its Second Successful Sherman Act Section 2 Criminal Prosecution, Baker McKenzie (Apr. 29, 2024), https://insightplus.bakermckenzie.com/bm/antitrust-competition_1/united-states-doj-scores-its-second-successful-sherman-act-section-2-criminal-prosecution [https://perma.cc/6JNZ-MMUE].

[169] Id. (discussing *United States v. Tomlinson*, No. 23-cr-00326 (D. Idaho Dec. 12, 2023)).

[170] Id. (discussing *United States v. Zito*, No. 22-cr-00113 (D. Mont. Mar. 29, 2023)).

fixing, allocating markets, and threatening violence against individuals who got in the way of their conspiracy.[171] The first and third cases involved joint action and would traditionally have been prosecuted under Section One of the Sherman Act.[172] It is far from clear what the Section Two charges added. The second case involved unsuccessful efforts at cartelization, which could not have been brought under Section One because there was no agreement, but reflected the same underlying behavior—cartelization—that has traditionally been prosecuted under Section One.[173] The Biden Administration can take credit for bringing (and getting a plea bargain in) a potentially landmark criminal solicitation case in *United States v. Zito* (the highway crack-sealing case),[174] but none of its criminal Section Two enforcement reflected the kind of ordinary, unilateral business behavior that was the subject of DOJ criminal enforcement in the 1950s and 1960s and which the defense bar took the Administration to be contemplating.[175]

The other key area in which the DOJ made clear that it would change things by bringing criminal cases was "no-poach" agreements among employers.[176] This was consistent with the neo-Brandeisians' focus on labor markets, discussed above with respect to mergers.[177] The DOJ brought its first criminal wage-fixing indictment at the tail of the Trump Administration in December of 2020, and the Biden Administration pursued that case and three other criminal no-poach or similar wage-fixing cases up to or through trial.[178] It lost three cases before juries, and

[171] Id. (discussing *United States v. Martinez*, No. 22-cr-00560 (S.D. Tex. Nov. 9, 2022)).

[172] See Mark Anderson, The Enigma of the Single Entity, 16 U. Penn. L. Rev. 497, 499, 502–03 (2014) ("Since relatively few firms have monopoly power or are dangerously close to acquiring it, the agreement question under Section One controls whether courts can assess the competitive effects of business behavior in the vast majority of situations.").

[173] See Jeffrey M. Cross, Antitrust Law: Section 1 of the Sherman Act 87 (2021) ("An agreement to fix, maintain, or reduce output has . . . been treated historically as a per se violation of § 1.").

[174] Plea Agreement at 3–4, *Zito*, No. 22-cr-00113.

[175] See Crane, supra note 164 at 766–75 (reporting twenty unilateral conduct criminal monopolization cases brought by the Justice Department between 1912 and 1973).

[176] See, e.g., Criminal Indictment at 4, United States v. Hee, No. 21-cr-00098 (D. Nev. Mar. 30, 2021) (describing the defendants' alleged scheme to control employees' wages through illicit no-poach agreements).

[177] See infra Paragraph I.A.2.ii.

[178] Lauren Norris Donahue & Erinn L. Rigney, DOJ Jettisons Its Last Criminal No-Poach Prosecution, but Antitrust Scrutiny of Labor Markets Is Here to Stay, K&L Gates (Dec. 21, 2023), https://www.klgates.com/DOJ-Jettisons-Its-Last-Criminal-No-Poach-Prosecution-but-

another was thrown out by a judge who found that no reasonable jury could convict on the charges.[179] The Administration did secure one plea deal in *United States v. Hee*, but after the string of defeats, it voluntarily dismissed its last remaining criminal no-poach case at the end of 2023.[180] The experiment in protecting employees through criminal no-poach enforcement was overwhelmingly a failure.

To be clear, neither the quantitative nor qualitative analysis here should be read as a claim that the Biden Administration was "weak" in criminal antitrust enforcement. As with merger enforcement, there are likely many factors, including long-term secular trends, that go into explaining an administration's antitrust enforcement record. However, from at least the present perspective, it cannot be said that the neo-Brandeisians succeeded in moving the needle forward on criminal antitrust enforcement. If anything, they let the needle slip back.

D. The FTC's Non-Compete Rule

The neo-Brandeisians' most radical action—radical in the sense of breaking with longstanding institutional practice, challenging the legal status quo, and dramatically reshaping facts on the ground—was the FTC's 2024 promulgation of a rule categorically prohibiting covenants not to compete in employment contracts.[181] The rule would overturn three hundred years of common law precedent that judged covenants not to compete under a rule of reason.[182] It would make thirty million existing contracts illegal overnight.[183] Perhaps most significantly, the rule represents the assertion that the FTC has substantive rulemaking power over unfair methods of competition under Section 6(g) of the FTC Act, a controversial view which, if vindicated, could dramatically increase the FTC's authority and fundamentally reshape the allocation of antitrust

Antitrust-Scrutiny-of-Labor-Markets-is-Here-to-Stay-12-21-2023 [https://perma.cc/443G-NJ2N].

[179] Id.

[180] One additional case remains pending. Id.

[181] 16 C.F.R. § 910.2.

[182] Daniel A. Crane, Essay, Scrutiny of Employee Covenants Not to Compete Under the Rule of Reason: An Empirical Inquiry, 100 Notre Dame L. Rev. Reflection 1, 1 (2024).

[183] Eugene Scalia, The FTC's Breathtaking Power Grab Over Noncompete Agreements, Wall St. J. (Jan. 12, 2023, 6:50 PM), https://www.wsj.com/articles/the-ftcs-breathtaking-power-grab-noncompete-agreements-rule-capital-investment-wage-gap-job-growth-compliance-11673546029.

responsibility between the courts and the antitrust agencies.[184] In short, the non-compete rule appears to be the thrust point of the entire neo-Brandeisian project of radically altering the antitrust status quo, delivering antitrust from the consumer welfare standard, focusing on labor markets, prioritizing political economy over technical microeconomics, and prying decisional authority away from conservative courts.

But the rule has been nationally enjoined[185] and stands little chance of ever seeing the light of day.[186] Even assuming that the appellate courts or Supreme Court are disposed to reject the grounds for the district court's injunction—that the FTC lacks substantive rulemaking authority under Section 6(g) and that the rule is arbitrary and capricious[187]—the rule would have to clear a host of other legal impediments—particularly the major questions doctrine—as identified in the dissenting statements of the two Republican Commissioners who voted against the rule.[188] Moreover, one of the two dissenters now controls the Commission as Chair, which gives them a number of avenues to ensure that the rule never sees the light of day.[189] While one cannot preclude a path to the rule eventually taking effect, its chances of survival seem vanishingly slim.

II. THE LONG VIEW

A key takeaway of this Essay is that the revolution did not happen.[190] At a statistical level, the Biden Administration did not act more aggressively in antitrust cases and, indeed, by many measures seemed to act less aggressively. It did not bring more merger challenges than other

[184] See Crane, supra note 44, at 426, 441.

[185] Ryan, LLC v. FTC, 746 F. Supp. 3d 369, 374–75 (N.D. Tex. 2024).

[186] See Scalia, supra note 183.

[187] *Ryan, LLC*, 746 F. Supp. 3d at 384, 388–89.

[188] Dissenting Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak: In the Matter of the Non-Compete Clause Rule, U.S. Fed. Trade Comm'n, 8–11 (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf [https://perma.cc/T2A9-63ZD].

[189] Andrew Ferguson was sworn in as FTC Commissioner in April 2024 and elevated to Chairman by President Trump on January 20, 2025. Amanda A. Sonneborn et al., Newly Appointed FTC Chairman Andrew N. Ferguson to Target DEI and Pursue More Case-by-Case Enforcement Policy Against Non-Competes, King & Spalding 1 (2025), https://www.kslaw.com/attachments/000/012/531/original/ca021325-2.pdf [https://perma.cc/UG86-42MC].

[190] Daniel Francis, After Neo-Brandeis, Promarket (Nov. 25, 2024), https://www.promarket.org/2024/11/25/after-neo-brandeis/ [https://perma.cc/U3H2-PZNJ] (taking the view that the "revolution never really came").

administrations and, in the ones it did bring, tended to win on conventional theories and lose on "edgy" theories.[191] Putting aside the *Google AdTech Case*—which was won on liability with the remedy phase still pending—the Biden Administration did not bring and win a single civil non-merger case.[192] The one case won at trial, the *Google Mobile Search Case*, was brought by the prior administration, and even then, the likely appeal will be executed by the incumbent Trump Administration.[193] The status-quo-challenging monopolization, Section Five, and Robinson-Patman cases the neo-Brandeisians did bring were also ceded without resolution to the next administration.[194]There was retrogression, not progression, on criminal enforcement.[195] And the neo-Brandeisians' signature initiative—the FTC's non-compete rule—seems likely moribund.[196]

So, is this the story of a failed attempt at revolution? Not so fast! There are two reasons that this Essay's analysis must be considered provisional. The short-term reason is that even the immediate story of the neo-Brandeisians' time in Washington is not yet fully known. Some of the data on the last year of the Biden Administration have not yet been reported,[197] and some of the civil non-merger cases (including all of the Big Tech, Section Two, and Section Five cases, and one of the Robinson-Patman cases) face a still-uncertain fate,[198] as does the non-compete rule.[199] The time to make a more complete assessment of the Biden Administration's antitrust policy and enforcement will be three or four years from now.

But there is another and longer-term reason why the "failed revolution" narrative should only be considered provisional. Revolutions take time. The neo-Brandeisian attempt at revolution is naturally compared to the last antitrust revolution—the Chicago School "coup" of the 1970s. While that revolution seemed to burst onto the scene with dramatic success starting in 1977, its roots lay in decades of scholarship and influence

[191] See supra Subection I.A.2.
[192] See supra Section I.B.
[193] See supra Subsection I.B.1.
[194] See supra Subsections I.B.2–3.
[195] See supra Section I.C.
[196] See supra Section I.D.
[197] See supra note 115.
[198] See supra Section I.B.
[199] See supra Section I.D.

stretching back to the 1950s.[200] The blueprint for much of what the Chicagoans later succeeded in implementing in antitrust law was laid out in the *Northwestern Law Review* in 1956.[201] Scholars like Robert Bork and Richard Posner, who later became the faces of the Chicago Revolution, worked out their theories in decades of scholarship, conferences, and teaching before the revolution came to fruition.[202] By the time the Supreme Court began to take notice in the late 1970s, a generation of law students, lawyers, and judges had been exposed to the Chicago School's claims, legal arguments, and policy prescriptions. A comprehensively worked out agenda was ripe for appropriation, and it had been widely socialized for decades.

Not so with the neo-Brandeisians. Lina Khan's famous note in the *Yale Law Journal* was published in 2017, barely four years before Khan became the chair of the FTC.[203] Tim Wu, who became Biden's competition czar in the White House, was a well-established scholar (famous especially for the idea of "net neutrality"), but had turned to antitrust from telecom relatively recently.[204] The neo-Brandeisians could certainly point to roots for their tradition going back to mid-twentieth-century antitrust enforcement and Judge Brandeis's ideas, but the project had not been comprehensively worked out, politically socialized, or engrained in the consciousness of law students, lawyers, and judges before the neo-Brandeisians came to Washington.[205] In contrast to the Chicagoans, the neo-Brandeisians thus came to political power much earlier in their movement's trajectory. One could say—meaning this not critically but analytically—that the neo-Brandeisians came to market half-baked.

[200] See Daniel A. Crane, Chicago, Post-Chicago, and Neo-Chicago, 76 U. Chi. L. Rev. 1911, 1911–13, 1911 n.2 (2009) (book review).

[201] See Mark Glick & Darren Bush, The Chicago School, the Post-Chicago School, and the New Brandeisian School of Antitrust: Who Is Right in Light of Modern Economics?, 30 Geo. Mason L. Rev. 935, 940–41, 44–45 (2023) (citing Aaron Director & Edward H. Levi, Law and the Future: Trade Regulation, 51 Nw. U. L. Rev. 281–82 (1956)) (stating that Director and Levi's article describes the preeminent Chicago School ideas, and tracing the direct impact of those ideas on declining antitrust enforcement and Supreme Court precedent).

[202] Glick & Bush, supra note 201, at 940–47 (describing Bork and Posner's contributions to the Chicago School through the 1950s–70s and the later impacts seen into the twenty-first century).

[203] See Khan, supra note 151.

[204] Timothy Wu, Colum. L. Sch., https://www.law.columbia.edu/faculty/timothy-wu [https://perma.cc/Q44L-AZ2K] (last visited Aug. 14, 2025).

[205] See Daniel A. Crane, How Much Brandeis Do the Neo-Brandeisians Want?, 64 Antitrust Bull. 531, 531–32 (2019).

With the benefit of the same decades that it took the Chicago School to come to fruition, the neo-Brandeisians' four years in Washington may appear to have been the genesis of a revolution, if not the revolution itself. The senior leadership of the Biden antitrust agencies made a special point of speaking at law schools to introduce their ideas to law students. My own experience teaching many of these students suggests that they are far keener on the neo-Brandeisians' ideas than is the average federal judge. In twenty years' time, many of these students will be the federal judges. Whether or not they succeeded in implementing most of their status-quo-challenging ideas, the neo-Brandeisians did succeed in putting their ideas on the table, doing so conspicuously, and doing so to an audience whose day has not yet come.

CONCLUSION

As the neo-Brandeisians retreat from Washington, it is natural to ask, "now what?" Certainly, there will be plenty to say about the Trump Administration's antitrust policy. There will also be plenty of questions asked about how to understand what actually happened during the Biden years. This Essay has given a provisional answer to that question: the revolution didn't happen. But the more complete answer is that it's too early to tell. Ask me again in twenty years.